



Supreme Court New South Wales

Medium Neutral Citation: **Adams v Health Care Complaints Commission [2025] NSWSC 1212**

Hearing dates: 4 July 2025

Date of orders: 16 October 2025

Decision date: 16 October 2025

Jurisdiction: Common Law

Before: Harrison AsJ

Decision: (1) The plaintiff's application for judicial review is dismissed.

(2) The plaintiff's summons filed 23 November 2023 is dismissed.

(3) The plaintiff is to pay the defendant's costs on an ordinary basis.

Catchwords: ADMINISTRATIVE LAW — judicial review — procedural fairness — Health Care Complaints Commission — decision not to take further steps to progress complaint against dentist — decision reviewed and confirmed by commission — whether judicial review available — failure to take matters into account — public safety — failure to give reasons

Legislation Cited: *Australian Courts Act 1828* (Imp) s 5
Health Care Complaints Act 1993 (NSW) ss 12, 28(8)(b), 92, 99A(2).

Cases Cited: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; [1992] HCA 10
Barton v The Queen (1980) 147 CLR 75; [1980] HCA 48
BQQ15 v Minister for Home Affairs [2019] FCAFC 218
Ceeroose Pty Ltd v A-Civil Aust Pty Ltd [2023] NSWCA 215
Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26

Hastwell v Health Care Complaints Commission [2021]

NSWCA 22

Hossain v Minister for Immigration and Border Protection

[2018] HCA 34

Hot Holdings Pty Ltd v Creasy (1996) 185 CLR 149; [1996]

HCA 44

LPDT v Minister for Immigration, Citizenship, Migrant

Services and Multicultural Affairs [2024] HCA 12

Maxwell v The Queen (1996) 184 CLR 501; [1996] HCA 46

Minister for Immigration and Border Protection v SZSSJ

[2016] HCA 29

Mohareb v Health Care Complaints Commission [2023]

NSWSC 1224

Mohareb v Health Care Complaints Commission [2024]

NSWCA 70

Plaintiff S157/2002 v Commonwealth of Australia [2003]

HCA 2

R v Department of Health; Ex parte Source

“Reg” v Prosser (1848) 11 Beav 306; 50 ER 834

Informatics Ltd [2000] 1 All ER 786

Wingfoot Australia Partners Pty Ltd v Kocak [2013] HCA

43;(2013) 252 CLR 480

Category:

Principal judgment

Parties:

Charlie Armstrong Adams (Plaintiff)

Health Care Complaints Commission (Defendant)

Representation:

Counsel:

Self-represented (Plaintiff)

I Chatterjee (Defendant)

Solicitors:

Self-represented (Plaintiff)

Health Care Complaints Commission (Defendant)

File Number(s):

2025/00067189

Publication restriction:

Nil

JUDGMENT

- 1 This judgment involves a judicial review of a decision of the Health Care Complaints Commission.
- 2 The plaintiff is Charlie Armstrong Adams. He is self-represented. The defendant is the Health Care Complaints Commission (the HCCC) and is represented by I Chatterjee of

counsel. The parties relied on an agreed joint court book marked as Exhibit A (Ex A).

- 3 By summons filed 23 November 2023, the plaintiff seeks judicial review of a review decision of the HCCC dated 4 October 2024, not to proceed with a complaint made by him against a dentist, Dr Jilin Cai (the dentist), concerning treatment he received from the dentist on 2 November 2023.
- 4 Of paramount concern to the plaintiff is the manner in which the dentist dealt with tooth 38 (T38), the plaintiff's lower left wisdom tooth.
- 5 The plaintiff seeks an order quashing the decision of the HCCC dated 4 October 2023. Some of the grounds of judicial review were not pressed at this hearing. The grounds of judicial review that remain to be decided are procedural unfairness, failure to consider relevant evidence, neglect of public safety concerns, failure to meet statutory obligations and non-compliance with s 28(8)(b) of the *Health Care Complaints Act 1993* (NSW) (HCC Act). He also seeks an order that the review decision of the HCCC dated 4 October 2024 be quashed and an order compelling the HCCC to reassess his complaint in compliance with the HCC Act, and principles of natural justice and fairness, and finally a thorough review of diagnostic failures and their impact on public safety.
- 6 At the hearing, the plaintiff was granted leave to rely on a further ground of judicial review that was not set out in the summons, namely that the notice of the HCCC's decision did not contain adequate reasons pursuant to s 28(8)(b) of the HCC Act. Counsel for the defendant was in a position to meet that additional ground of judicial review.

Background

- 7 On 26 May 2023, the plaintiff initially attended upon the dentist reporting pain in quadrant 2 of his mouth, with specific concerns about two teeth referred to as T25 and T26. The dentist performed local debridement to flush the gap between T25 and T26, with advice given to monitor for two weeks and re-attend if his symptoms did not improve. On 8 September 2023, T26 split and was removed by another dentist.
- 8 On 2 November 2023, the plaintiff re-attended upon the dentist for a cleaning and check-up. He reported the split and extraction of T26 (the plaintiff's upper left wisdom tooth) to the dentist. The plaintiff was advised by the dentist that grinding was causing multiple teeth to break at the gum line and that consistent use of a night guard was very important.
- 9 The plaintiff subsequently had two further teeth extracted, namely, an upper left wisdom tooth (identified by the dentist as T28) on 1 February 2024, and a lower left wisdom tooth (T38) on 28 February 2024, both by a different dentist. The upper tooth had suffered a vertical root fracture while the lower tooth was "severely decayed" with "a very large hole".
- 10 The plaintiff submitted that the dentist failed to identify the issues with these teeth on 2 November 2023, which led to "ongoing pain, distress, and subsequent dental procedures".
- 11 On 1 February 2024, the plaintiff says he "confronted" the dentist about his concerns and complained of what he described as the dentist's "dismissive attitude and lack of professional accountability".

Provision of dental records

- 12 The plaintiff sought the Commission's assistance in obtaining his dental records. On 19 June 2024, the dentist provided an electronic copy of the plaintiff's records to the Commission.
- 13 With respect to the plaintiff's medical records, the dentist identified that all patients at the practice (Dental XX) have permanent "access to their complete dental records at any time and location, immediately available after each appointment" through a phone app that patients are required to have installed on their phones.
- 14 The HCCC ultimately provided the plaintiff discovery of the documents it had before it, including the assessment brief provided to the Dental Council. This is a subject to which I will return.
- 15 The dentist provided a substantive response by way of a letter dated 26 June 2024 relevantly asserting that:
- (1) The plaintiff did not raise any concerns in relation to T28 or T38;
 - (2) The available radiographic records from 26 May 2023 showed no pathology for

either tooth;

- (3) As the records were less than 6-12 months old at the time, further radiology was contradicted as it would be “inappropriate for radiation safety”; and
- (4) Their condition at the date of extraction is not necessarily reflective of their state at the date of consultation (which was three months earlier).

16 The dentist also responded to his interaction with the plaintiff in February 2024 and apologised that “the exchange made Mr Adams feel I was being evasive around his concerns”, and reflected that the conversation “should have been conducted in a more apposite fashion”.

17 The Commission consulted with the Dental Council of NSW (the Dental Council) as to the plaintiff’s complaint, as statutorily required pursuant to s 12 of the HCC Act. The process in this instance involved three Commission officers consulting with three Council officers on 8 August 2024. The Council’s recommendation, which the Commission ultimately adopted, was to “[d]iscontinue with comments”. The Council’s observations with respect to this complaint (which were also effectively adopted by the Commission) were as follows:

“The patient complains about the quality of treatment from Dr Cai which the patient believes “constitutes negligence”.

Mouths such as this where teeth are under significant occlusal stress from grinding are difficult for the patient to live with and for the dentist to diagnose. Build up of stress in the teeth over time can create vertical fractures. If the vertical crack actually separates, diagnosis is easy. But, early detection is impractical and diagnosis of unseparated cracks in symptomatic teeth is uncertain and tricky.

The clinical notes are thorough. At appointment 1 the testing by Dr Cai on symptomatic teeth has been described and the diagnosis was provisional and appropriate. Treatment options were offered with a warning to return if symptoms did not abate.

There is concern however, that Dr Cai does not recognise the possibility that his examination may not have been thorough. He mentions a few times that photos of an extracted tooth do not represent the state of the tooth 3 months previous. This is generally inaccurate as, apart from cracks, the condition of a tooth should not vary dramatically over 3 months.

Recommendation:

Discontinue with comments

Dr Cai was a very new graduate at the time of the complaint. He must understand that there are times when he needs to take ownership of any shortcomings in his clinical skill, he needs to show genuine regret if appropriate and he must improve his clinical skills continually. In this situation, he must ensure that his clinical examinations are absolutely thorough in the future.”

[My emphasis added.]

18 The HCCC submitted that the Council’s consideration of T28 and T38 can be seen from its identification that “diagnosis of unseparated cracks in symptomatic teeth is uncertain and tricky”, taken with the consideration that the dentist’s “examination may not have been thorough”, and the rejection of his assertion that “photos of an extracted tooth do not represent the state of the tooth 3 months previous”. The first observation relates to

T28, while the latter comments are focused on the possibility that the decayed tooth T38 was in a similar state as at the date of consultation and therefore, may have been missed by the dentist.

- 19 On 20 June 2024, the plaintiff also raised various complaints regarding the manner in which the Commission was assessing his complaint, alleging that the assessment officer allocated to his complaint was in “potential collusion” with the dentist’s practice, Dental XX. In correspondence in the days immediately after, the plaintiff also asserted that he was:

“... increasingly concerned about the conduct of HCCC staff including actions that suggest systemic issues of obfuscation, corruption, discrimination, and gaslighting. It is alarming that senior management at the HCCC appears to be neither curbing nor investigating these serious allegations. This level of corruption is inconsistent with Australian values and more reminiscent of practices seen in less transparent, third-world governance structures where agency staff act with impunity.”

- 20 The plaintiff continued as follows:

“Additionally, I am particularly interested in understanding if the actions of [XXXX], [XXXX], and [XXXX] have been escalated to senior management for investigation. Their handling of complaints has raised significant concerns, and I believe it is imperative that their actions are scrutinized to ensure accountability and integrity within the HCCC.

Furthermore, could you kindly provide me with the contact details of the most senior official or director at the HCCC? I would appreciate their email address so that I may escalate my concerns directly.”

- 21 At the hearing in the court, the plaintiff elected not to press his concerns of bias against anyone who handled his complaint at the HCCC.

- 22 On 13 August 2024, the Commission wrote to both the dentist and the plaintiff with notice of its decision for the purposes of s 28 of the HCC Act. The Commission’s letter to the plaintiff set out in material form the Council’s observations above and concluded by notifying the plaintiff that:

“Based on these findings, the Commission and the Dental Council of NSW agreed that there was not a significant departure from acceptable standards that requires further action by the Commission.”

- 23 That day, the plaintiff replied to the Commission requesting a review of the decision concerning his complaint against the dentist (above). The plaintiff wrote to the Commission again on 13, 14, 15, 18 and 20 August 2024 concerning the review.

- 24 The Commission conducted a review that resulted in the same determination. The plaintiff was informed of that decision by way of an email on 8 October 2024 (attaching a letter dated 4 October 2024) (the review decision). It relevantly stated:

“The initial assessment determined that the appropriate response to this situation was to provide feedback to Dr Cai about the importance of recognising potential shortcomings and that clinical examinations are absolutely thorough. The review determined that this was the most appropriate outcome in the circumstances and noted that the feedback was provided with the clear expectation that Dr Cai will improve his future practice.”

Key findings in the review decision of the HCCC dated 4 October 2024

- 25 The HCCC found on review it did not find a basis for further action by the Commission based on the following findings (CB 39-40):

“The key findings of the review are as follows:

During the assessment, the Dental Council of New South Wales thoroughly examined your concerns. This statutory body comprises practitioners, legal experts, and community representatives, most of whom are nominated by the NSW Minister for Health and appointed by the Governor of NSW. The Council possesses the authority to regulate the conduct and health of registered dental practitioners.

Based on the medical records, the Council concluded that the standard of care provided did not fall below accepted standards. They noted that Dr Cai's medical records were detailed and contemporaneous, and that his initial care plan, provisional diagnosis, and treatment recommendations were reasonable.

While Dr Cai did not identify any issues with teeth 28 and 38, the complexities of diagnosing vertical fractures were acknowledged by Council. It is understood that tooth 28 was later diagnosed with a vertical root fracture on 1 February 2024, and subsequently extracted by Dr Yurka.

The Council recognised your concerns regarding Dr Cai's assessment on 2 November 2023, as well as his assertion that, given there were no reported issues or definitive symptoms at the time, the photos of the extracted tooth did not accurately reflect its condition over the previous three months. While it is true that diagnosing such issues can be challenging, the Council noted that, aside from cracks, a tooth's condition should not change dramatically within a three-month period.

The initial assessment determined that the appropriate response to this situation was to provide feedback to Dr Cai about the importance of recognising potential shortcomings and that clinical examinations are absolutely thorough. The review determined that this was the most appropriate outcome in the circumstances and noted that the feedback was provided with the clear expectation that Dr Cai will improve his future practice.

Dr Cai has also acknowledged the communication breakdown that occurred and has apologised, recognising that his communication during this interaction may not have been ideal. He has expressed regret for not addressing the situation more effectively and has committed to enhancing his communication skills through professional development training.

...

The summons

26 The grounds of judicial review raised in the summons were firstly, procedural unfairness; secondly, failure to consider relevant evidence; thirdly, neglect of public safety concerns; and finally, that the Commission's decision did not contain adequate reasons pursuant to s 28(8)(b) of the HCC Act.

27 At the hearing on 4 July 2025, the plaintiff ultimately withdrew appeal ground 2 relating to bias:

"PLAINTIFF: And secondly, I am, like, not - not contesting bias now.

HER HONOUR: You're not contesting bias?

PLAINTIFF: No. No." (T50 [43]-[47])

28 The plaintiff changed his mind but then confirmed that the only grounds that were being contested included procedural fairness, failure to consider relevant evidence, neglect of public safety concerns and the new ground of s 28(8)(b) of the HCC Act:

"HER HONOUR: What else do you say can come out now?

PLAINTIFF: So the only points that I would like to contest is - is procedural fairness and also section 28 clause 8(b). And that's all that I have to say." (T51 [16]-[19])

...

"HER HONOUR: What about "failure to consider relevant evidence"? Do you want that in?

PLAINTIFF: No. No.

HER HONOUR: No, but you're saying - all right. So two's gone. Three, "An order compelling". With that--

PLAINTIFF: Sorry, your Honour. In fact I will change my mind. It's a bit--

HER HONOUR: Yes, yes, because it sort of follows.

PLAINTIFF: --like, embarrassing but I'm going to do it.

HER HONOUR: You're saying they didn't consider tooth 38. Yes, okay, so I'll put it back in. I'll just write it back in." (T51 [39]-T52 [4])

...

"PLAINTIFF: I would - would like to include the ...(not transcribable)... public safety--

HER HONOUR: I see.

PLAINTIFF: --because that might be an argument--

HER HONOUR: For costs, okay.

PLAINTIFF: --that I will pull out in costs." (T54 [20]-[29])

- 29 Most of these grounds of judicial review overlap. While the plaintiff dealt with each of grounds 1, 3 and 5 separately, the HCCC dealt with them together. I will set out the plaintiff's submissions individually, followed by the HCCC's submissions then make my resolution in relation to grounds 1, 3 and 5 together. I will then deal with ground 4 and the new ground 7 concerning s 28(8)(b) of the HCC Act. As set out earlier, grounds 2 and 6 (being procedural irregularities and suspicious conduct) were not ultimately contested by the plaintiff.

A preliminary issue

Does this Court have jurisdiction?

- 30 The HCCC argued that this Court has no jurisdiction to hear this judicial review due to a decision in *Hastwell v Health Care Complaints Commission* [2021] NSWCA 22 ('*Hastwell*').

HCCC's submissions

- 31 Counsel for the HCCC submitted that this Court does not have jurisdiction to undertake a judicial review of the review decision of the HCCC confirming its decision not to take any further action, which was made after examining the plaintiff's complaint.
- 32 In *Hastwell*, Basten JA said:

"[1] BASTEN JA: In August 2016 the applicant, Haydyn Gary Hastwell, made a complaint to the Medical Council of New South Wales regarding the conduct and performance of Dr Julian Parmegiani, consultant psychiatrist. The applicant had been referred to Dr Parmegiani for a medico-legal report which, no doubt if favourable, he hoped to deploy in a claim against his previous employer. He therefore had had a contractual relationship with Dr Parmegiani, for the provision of services, in the form of the report, but not as a patient undergoing treatment.

[2] The complaint was referred to the respondent, the Health Care Complaints Commission. In circumstances fully explained by Leeming JA, the Commission ceased dealing with the complaint. On 13 November 2018, two years and two days after the complaint was discontinued, the applicant filed a summons in the Common Law Division seeking judicial review of the decision to discontinue dealing with the complaint.

[3] The primary judge, Rothman J, dismissed the summons. By summons filed on 24 August 2020 the applicant sought leave to appeal from that judgment.

[4] I agree with Leeming JA that the application for leave to appeal should be dismissed, and that the applicant must pay the Commission's costs in this Court. I also agree with the reasons given by Leeming JA for that conclusion, given the way in which the matter was argued in this Court. However, there is a more fundamental doubt attending the availability of judicial review to a complainant whose complaint has been considered but not proceeded with."

...

[11] Although it was conceded by the Commission that it owed a duty of procedural fairness to the complainant, the basis of that duty was not identified. Generally speaking, such a duty is owed in circumstances where a body may exercise power adversely to the rights or interests of another person. The conferral of such a power will usually entail an obligation (express or implied) to allow the person an opportunity to be heard against the exercise of the power, and to be notified of material which might support such an adverse exercise of the power. However, that is not always the case: police are not required to provide procedural fairness before arresting a person or obtaining a search warrant with respect to another person's premises. Furthermore, the complainant is not the object of the exercise of the functions imposed on the Commission: it is the practitioner the subject of the complainant who is the object of possible sanctions and who will usually be entitled to procedural fairness during the complaint-handling process.

[12] If a statute "confers power to destroy or prejudice a person's rights or interests," it is accepted that principles of natural justice will regulate the exercise of that power. Those principles may be of varying content, but will only be excluded by "plain words of necessary intendment". However, it remains a question of statutory construction as to whether the precondition to the obligation arises in a particular case. It is by no means clear that such an obligation is owed to a complainant in relation to the handling of a complaint against a medical practitioner by the Commission.

[13] It is correct, as the applicant submitted, that the paramount consideration for the Commission is "the protection of the health and safety of the public": *Health Care Complaints Act*, s 3(2). This provision identifies a public interest, not the interest of an individual complainant, and the Commission is given power to pursue such a goal even if the complainant does not wish to, for example, where any dispute between the complainant and the health practitioner has been resolved.

[14] There is no issue but that the Commission received the complaint from the Medical Council, commenced an assessment of the complaint, consulted the Medical Council as to its proposal not to investigate further, and advised the complainant of the outcome. It was entitled to take the final step on the basis that the subject-matter of the complaint was "trivial or does not warrant investigation or conciliation or the Commission dealing with it under Division 9": s 27(1)(b). (Division 9 of Pt 2 provides for "an alternate and neutral process of resolving complaints that is independent of the investigative processes of the Commission": s 58B(a).) The power of discontinuance is thus conferred in broad terms which depend upon the Commission making an evaluative judgment. That judgment is vested in a body which is the statutory authority responsible for maintaining standards of the health care system within the State. Arguably, it is no more subject to the supervisory jurisdiction of this Court than is the police force or a public prosecutor within their areas of operation.

[15] The principles with respect to public prosecutions were addressed in *Barton v The Queen*, which dealt with an attempt to review the filing by the Attorney-General of an ex officio indictment. In the course of their joint reasons, Gibbs ACJ and Mason J (with whom other members of the Court relevantly agreed) referred with approval to the statement in *Reg v Prosser* that the Attorney-General's power to stay proceedings or enter a nolle prosequi was unreviewable, stating:

"*Prosser* dealt, not with the prerogative power to present an ex officio information, but with the prerogative to enter a nolle prosequi. None the less, there is no reason to doubt that the conclusion rests on the general principle that a prerogative power was not examinable by the courts."

The same reasoning was adopted with respect to the statutory power found in s 5 of the *Australian Courts Act 1828* (Imp) which authorised the prosecution of criminal offences by information in the name of the Attorney-General.

[16] In *Maxwell v The Queen* Gaudron and Gummow JJ stated:

"It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to

proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted.”

[17] One rationale for that approach, namely that the integrity of the judicial process would be compromised if the courts were to decide who should be prosecuted and for what, does not apply with respect to disciplinary proceedings. Further, it may be accepted that, where the statute imposes limitations or obligations, those may be enforced by way of orders in the nature of prohibition and mandamus. However, the fact that a “client”, which includes any person who has used or received “health services” from a health practitioner, may make a complaint about a health practitioner, does not create an obligation in the Commission to take any particular action on the basis of a complaint, nor to do more than identify in broad terms the reason why a particular step has, or has not, been taken. As further explained in the joint reasons in *Barton*:

“It is not correct to say that the exercise of every power given by statute is examinable by the courts in the manner suggested by the appellants. It is correct to say that in cases where a statute confers an administrative discretion which is unlimited in terms, the court must concede to the repository a discretion unlimited by anything but the scope and object of the statute.

The provision made by s 5 is very different from an ordinary administrative discretion conferred by statute. The section is a self-contained provision the scope of which is unaffected by other provisions in the statute. It imposes no duty on the Attorney-General to consider whether a prosecution shall be instituted.”

[18] These considerations engage the principled limitation as to the scope of the supervisory jurisdiction, when invoked to quash a decision. The principle is explained in *Hot Holdings Pty Ltd v Creasy* in the following terms:

“The proposition that certiorari will lie only in respect of a decision which determines questions affecting rights has led to a number of cases, of which the present is one, where the contention has been that the decision in issue is merely advisory, provides a recommendation, or is made at a preliminary stage of a decision-making process.

Consideration of the requirement for certiorari that the impugned decision determines questions affecting rights, on occasion has been confused with a distinct body of principle. This concerns the existence of a requirement of procedural fairness. The conceptual distinction is neatly illustrated by the decision of this Court in *Ainsworth v Criminal Justice Commission*. In that case it was held that there had been a failure to observe the requirements of procedural fairness but, nevertheless, certiorari did not lie because no legal effect or consequence attached to the report in question.”

[19] If the *Health Care Complaints Act* conferred any legally enforceable rights on a complainant, they were limited to receiving an acknowledgement that a “complaint” complying with the Act had been lodged, and notification of steps taken to deal with it. The Commission accepted the complaint and gave the applicant notice, in accordance with s 28(1) of the *Health Care Complaints Act*, of its decision to discontinue dealing with the complaint. It gave reasons for the decision pursuant to s 28(8)(b). There is no suggestion otherwise. Applying *Hot Holdings* in the context of the statutory scheme, the decision to discontinue dealing with the complaint was not reviewable on the grounds relied on by the applicant.”

[footnotes omitted]

- 33 Counsel for the HCCC also referred to Leeming JA’s agreement with Basten JA in *Hastwell* at [24]:

“[24] I agree with what Basten JA has written doubting the Supreme Court’s jurisdiction to entertain Mr Hastwell’s application. However, while it is a court’s “first duty” to consider its jurisdiction, this Court’s jurisdiction to hear and determine the appeal from the judgment of the Common Law Division is undoubted, and in the absence of a notice of contention or submissions on the point, it is appropriate to address Mr Hastwell’s proposed grounds of appeal on their merits...”

- 34 Counsel for HCCC submitted that in accordance with *Hastwell*, the review decision is not amenable to judicial review by the plaintiff. That is, while the dentist was owed statutorily enshrined obligations in relation to procedural fairness and natural justice, as

the subject of the complaint, the plaintiff was only owed the specific obligations identified by the Court at [19] of *Hastwell*; namely, that the complaint had to be assessed and notice of reasons given, neither of which give rise to the right of certiorari claimed here.

- 35 Counsel for the HCCC also submitted that in *Mohareb v Health Care Complaints Commission* [2023] NSWSC 1224 (*'Mohareb'*), Weinstein J considered that Basten JA's analysis in *Hastwell* was binding but also agreed at [68] with those conclusions, following consideration of the HCC Act. While the Court of Appeal set aside *Mohareb* on a consent basis (in *Mohareb v Health Care Complaints Commission* [2024] NSWCA 70), when the Commission accepted that it made statements that were incorrect such that "its Review Decision was invalid and of no effect, being tainted by jurisdictional error", the reasoning in *Hastwell* was not affected.

The plaintiff's submissions

- 36 The plaintiff did not make any specific submissions on this topic but I have taken his other arguments and submissions into account before making this resolution.

Resolution

- 37 It is my view that the decision in *Hastwell* does apply here. While the plaintiff may make a complaint against the dentist, it does not create any obligation on the Commission to take any particular action on the basis of that complaint, nor to do more than identify in broad terms the reason that a step has or has not been taken. It follows that this Court has no jurisdiction to review the review decision of the HCCC confirming its decision not to take any further action. It is nevertheless not clear whether all of the plaintiff's grounds of judicial review relate to the review decision (being the relevant decision). *Hastwell* would also be fatal to any judicial ground of appeal that relates to the HCCC decision. On this basis, the plaintiff's application for judicial review is dismissed.
- 38 In the event that I am wrong, I will briefly deal with the plaintiff's grounds for seeking judicial review.

Judicial review ground 1 – procedural unfairness

- 39 This ground of judicial review is that the HCCC failed to provide a fair and impartial review process by not adequately considering all the evidence provided by the plaintiff, including photographic evidence and the timeline of dental treatment. This ground of judicial review overlaps with grounds 3, 5 and the new ground 7.

Plaintiff's submissions

- 40 The HCCC failed to conduct a fair and impartial investigation. The decision lacked transparency and did not adequately address all relevant evidence, including the critical issue of the black tooth that the dentist cleaned, leaving a black mark in an area he

could not reach due to the positioning of the lower left wisdom tooth, which was butted up against the second molar.

- 41 After the lower left wisdom tooth was removed, the black mark, which was previously obscured, became clearly visible. This black discoloration is generally indicative of significant dental issues, such as decay or cavity formation. The fact that the dentist cleaned the tooth without mentioning the black area, nor recording it in his dental records, raises questions about the thoroughness and accuracy of his assessment.
- 42 The plaintiff is uncertain whether the HCCC considered the black mark as part of their investigation, as neither the initial outcome letter nor the review of the decision mentioned this significant detail. Despite the plaintiff's request for clarification on this point, the HCCC did not respond.
- 43 Given the significance of this omission, it is reasonable to infer that the HCCC's failure to address this key evidence demonstrates a lack of procedural fairness in their decision-making process. In *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 ('SZSSJ'), the High Court held that procedural fairness is a fundamental requirement in administrative decision making where the rights or interests of an individual are affected. The Court emphasised that a failure to properly consider critical evidence relevant to the decision-making process can amount to a breach of procedural fairness. In the present case, the HCCC's omission to address the critical evidence concerning the black tooth, which the dentist cleaned without noting or recording, parallels the procedural deficiencies identified in SZSSJ. The omission of this significant diagnostic detail from both the initial decision and the review letter undermines the transparency and fairness of the investigation, thereby justifying judicial scrutiny and reassessment.

Judicial review ground 3 – failure to consider relevant evidence

- 44 This ground of judicial review asserts that the HCCC did not properly evaluate key evidence, including the timeline of symptoms, the nature of the dental issues, and the impact of the failure to diagnose the fractured tooth in a timely manner.

Plaintiff's submissions

- 45 The HCCC did not adequately consider the evidence the plaintiff presented regarding the black tooth, which the dentist cleaned without recording or notifying the plaintiff of its significance. The black area that remained (where the tooth was butted against the second molar and could not be cleaned) was later revealed to be a significant cavity, ultimately resulting in the extraction of the tooth.
- 46 Despite the critical nature of this evidence, in demonstrating a clear diagnostic oversight, neither the initial outcome letter from the HCCC nor the review of the decision made any mention of the black tooth or its significance. This omission is particularly concerning given that the plaintiff raised this issue and requested

clarification, but the HCCC did not respond.

- 47 This failure to assess crucial diagnostic indicators directly impacted the accuracy and completeness of the professional conduct assessment, leading to an erroneous and biased decision. By neglecting to address or even acknowledge this central piece of evidence, the HCCC's decision-making process lacked the necessary rigor and impartiality, thereby compromising the fairness of the review.
- 48 Both parties referred to the principle established in *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26 ("*Dranichniko*") that a decision-maker fails to discharge their duty if they do not address or consider a significant and substantial argument that is central to the case. In this context, the High Court emphasised that a failure to engage with crucial evidence or material arguments leads to a decision being legally flawed.
- 49 The plaintiff further submitted that the HCCC's failure to address the key evidence of the black tooth (despite its diagnostic significance and my specific request for clarification) demonstrates a similar legal error. By omitting this crucial aspect from both the initial decision and the review, the HCCC failed to fulfill its duty to adequately consider relevant evidence, thereby compromising the fairness and accuracy of the professional conduct assessment.
- 50 In oral submissions, the plaintiff says that his request for review of the HCCC's decision was focused on T38 because, unlike the other teeth that he believes the dentist negligently dealt with, he had taken photographs depicting the black that been cleaned off.

"PLAINTIFF: So, my point is, is that when I asked for the review of - of the ... (not transcribable)... decision, I honed in and very much focused on tooth number 38, because I've got photographic evidence of the black, the black cleaned off, and the - and, like, the hole.

HER HONOUR: And the ultimate result, that it was extracted?

PLAINTIFF: Yeah. And that was the central part of my complaint. That was the very - because the other two teeth, which I believe that there was negligence on, there are grey areas where I will never be able - how could I put it, there are grey areas that Dr [Cai] can say, well, some time lapsed in between changes in those teeth could have happened. I can never, ever prove that. He cannot prove what I'm saying is incorrect and I can't prove what he's saying is incorrect. It is never going to happen. That's why I am laser focused on tooth--

HER HONOUR: 38?

PLAINTIFF: Yeah, where there has been black, cleaned off, there's black on the front of the front - like, the tooth that was butted up--

HER HONOUR: I understand.

PLAINTIFF: -- and Dr [Cai] made no reference to any black and on a clean and check-up, a black is a serious - if a tooth is black like that, it is a serious indication that there is something going on there, and he made no - he didn't say anything to me about it and he didn't--

HER HONOUR: Put it in his notes.

PLAINTIFF: No.

HER HONOUR: You're agreeing with me, he didn't put it in the notes?

PLAINTIFF: Correct..." (T21 [6]-[40])

- 51 By reference to the HCCC's undated assessment brief (CB 90-92), the plaintiff was concerned that the additional material that he provided to the HCCC, including photographs of tooth T38, were not provided to the Dental Council. The forwarding email (CB 89) from the HCCC to the Dental Council seeking to consult under s 12 of the HCC Act was dated as having been sent on 25 July 2024, prior to the initial decision made by the HCCC on 13 August 2024.

"PLAINTIFF: I also gave photos, and I pleaded with the Healthcare Complaints Commission to investigate tooth number 38, which in the outcome letter for the review of decision they completely omitted again and ignored all my emails. I find this highly - highly - I don't want to make accusations, but I will say this. I find it highly irregular what has gone on in this - in this particular case. And Mr [Shah] did not want to hand over the assessment brief. Now it's [g]ot no date. And I'm trying to find out if it was--

HER HONOUR: It's got no date - sorry. It's got what was sent, but the forwarding email doesn't appear to have a date on it.

PLAINTIFF: Correct.

HER HONOUR: Yes.

PLAINTIFF: And that's what I wanted to know, was this - was this after I asked - asked for the review of decision or was it forwarded to the Dental Council at the investigation of the first complaint, the first outcome letter from the Healthcare Complaints Commission? Because when I asked for the review of decision, I also included - because I couldn't believe--

HER HONOUR: So, you say you included some additional material? Is that what you say?

PLAINTIFF: Yeah.

HER HONOUR: And you're not sure whether that would--

PLAINTIFF: Yeah.

HER HONOUR: The Dental Council got that?

PLAINTIFF: Yeah.

HER HONOUR: Is that what you say?

PLAINTIFF: Like, those photos in my view are damning and the Dental Council needed to see what I submitted later on. I find it highly irregular, and now there's no date." (T17 [47]-T18 [35])

HCCC's oral submissions

- 52 As counsel for the HCCC explained, the materials that the plaintiff included in his original complaint to the HCCC (which included emails to DentalXX containing photographs of the relevant teeth, CB 41-53) were provided to the Dental Council. This material formed part of the HCCC's assessment brief (CB 90-02) and was provided to the Dental Council for the purposes of its assessment before the HCCC's first decision was made (noting ultimately, that the HCCC made the decision in line with the Dental Council's recommendations). However, the Dental Council was not consulted again when the review decision was made (the review decision being a review of the HCCC decision).

"CHATTERJEE: I can tell your Honour that the materials were provided to the Dental Council for the purposes of the assessment before the first decision, and there was no further consult with the Dental Council when the review decision was made.

PLAINTIFF: Okay. Well, I am satisfied that - that's what I wanted.

HER HONOUR: All right. So, the review was the review of the decision of the Dental Council?

CHATTERJEE: No, it's a decision by the Health Care Complaints Commission. Before the Health Care Complaints Commission can make a decision, it must consult.

HER HONOUR: Yes, okay.

CHATTERJEE: So, it consulted, made a decision that was in roughly similar terms to the recommendations made by the Dental Council.

HER HONOUR: Yes.

CHATTERJEE: Mr Adams sought a review of that decision of the commission. There was no further consult with the Dental Council when the review decision was made." (T20 [25]-[48])

Judicial review ground 5 – failure to meet statutory obligations

53 This ground of judicial review asserts that the HCCC did not comply with its statutory duties under the HCC Act by inadequately assessing the complaint and failing to ensure public confidence in the healthcare complaints resolution process

54 S 28(8)(b) *Health Care Complaints Act* 1993 reads:

(8) The Commission's notice to the parties to the complaint must include—

...

(b) the reasons for the decision.

Plaintiff's submissions

55 The HCCC did not fulfill its obligations under the HCC Act, which mandates thorough and impartial investigation of healthcare complaints. By failing to adequately consider the key evidence of the black tooth, the HCCC has compromised public confidence in the healthcare complaint resolution process.

56 The principle established in *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 highlights that administrative decisions involving jurisdictional errors are not protected from judicial scrutiny, even where a privative clause exists. The High Court held that failure to properly consider key evidence or conduct a thorough and impartial investigation constitutes a jurisdictional error, rendering the decision susceptible to judicial review. In the context of the HCCC's decision, the failure to adequately address the critical evidence regarding the black tooth may amount to such an error, thereby justifying judicial intervention.

57 During the hearing, the plaintiff provided photographs of his teeth T28 and T38 in his complaint provided to the HCCC, but he says that those photographs were not given to the Dental Council such that it could not properly evaluate his complaint. He submitted that the HCCC did not refer to these photographs and of the black teeth in its review and decision letter nor was it communicated to the Dental Council, in breach of s 28(8) (b) of the HCC Act and the obligation to evaluate complaints and give reasons as to why they did not pursue the complaint and reprimand the dentist.

"PLAINTIFF: Can I just say something. I have - I have seen the assessment brief and I've also seen the - in the court book. The problem with the Health Care Complaints Commission is that they didn't give context for the tooth 38.

HER HONOUR: Yes, to the Dentistry Council.

PLAINTIFF: Yeah. Yeah, there was absolutely no context at all. So there was no point even contacting the - the Dental Council because they didn't give that information that the Dental Council needed to make an evaluation. They - they totally— (T9 [25]-[35])"

...

"But my point being is, is that Dr [Cai], what he did is he simply just cleaned off the black which we can see in the photos that I actually - that I provided to the Health Care Complaints Commission." (T11 [4]-[7])

...

"PLAINTIFF: ... Now the problem is that this is actually a very, in my view, it's a very - it's a - it's negligence and I was also expecting the Health Care Complaints Commission to actually seriously investigate this but they didn't mention it in their outcome letter, they didn't mention in their review of the decision letter and they did not communicate the context to the Dental Council. This tooth was central to my complaint and although I might - may not be clear on section 28, I may actually need a little bit more, like, time to re-find that but my understanding is that the Health Care Complaints Commission when there is a - when something is central to a complaint they must evaluate it and - and give a reason why or why not they are not pursuing the complaint or - or they are not - are reprimanding Doctor [Cai]." (T13 [1]-[12])

...

"HER HONOUR: --"Must include reasons for the decision"?

PLAINTIFF: Yes. But the point is that the - that with number 38, it was never addressed. There was no reason for the decision because it was totally omitted except for in the assessment brief where he gave a very vague-- (T14 [14]-[18])"

- 58 The plaintiff then accepted counsel for the HCCC's explanation that it was not obliged to release the documents that the plaintiff requested, being the assessment brief, because of the protection afforded by s 99A(2) of the HCC Act. However, as mentioned earlier in this judgment, the HCCC did release those documents, rather than taking the legal point, in an effort to put the plaintiff's mind at ease.

"CHATTERJEE: No, your Honour. Let me find the - yes, subs 2, "a person may not be compelled in any legal proceedings to give evidence about, or produce information containing, any information obtained in exercising a function under this Act." So, the commission's position is, it is under no legal obligation to produce these documents. There is a substantial public interest in that non-compellability, because if doctors, for instance, were aware that their responses - or if witnesses were aware that their responses could be obtained by a complainant through collateral proceedings, they will not be frank. In the circumstances of this matter, and to avoid an unnecessary dispute, a discretionary decision was made to disclose the materials to try and put Mr Adams' mind at ease. I will just say for the record, that I reject any suggestion that Mr Shar, or any other officer of the commission, has done anything improper, and they were, most certainly, entitled to deny, if they wished to do so, the production of the material.

HER HONOUR: Okay.

PLAINTIFF: Okay. I am satisfied with that explanation as a self-represented - I don't have a law—" (T19 [32]-[50])

HCCC's submissions – judicial review grounds 1, 3 and 5

- 59 Two preliminary matters should be noted. First, as the operative decision is the review decision, the plaintiff must establish jurisdictional error in the review decision.
- 60 The second is that, in considering the extent of the HCCC's function, it was expressly not granted the "power to determine or recommend general standards of clinical practice" (s 92, HCC Act).
- 61 The plaintiff's judicial review grounds 1, 3 and 5 traverse the same ground, which is an alleged failure by the Commission to take into account "black discolouration" on T38 said to have been present at the date of consultation, which was not noted by the dentist, and which is said to be "generally indicative of significant dental issues". Ground 1 describes this as a denial of procedural fairness; ground 3 describes it as an error to consider key evidence; and ground 5 as a breach of statutory obligations.
- 62 It is accepted that in certain circumstances, a failure to take into account material can amount to a denial of natural justice, or amount to a constructive failure to exercise jurisdiction. Referring to *Dranichnikov*, the HCCC proceeds on the basis that the plaintiff contends that the HCCC constructively failed to exercise jurisdiction by failing to take into account "a substantial, clearly articulated argument relying upon established facts" (per Gummow and Callinan JJ at [23]-[25]).
- 63 However, the failure to take material into consideration only amounts to jurisdictional error in very confined circumstances. In *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 (Kiefel CJ, Gageler J and Keane J) ('*Hossain*'), jurisdictional error was defined as (at [24]):

"a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it."

- 64 Further, in *Dranichnikov*, Kirby J observed at [88] (cited with approval by the Court of Appeal in *Ceeroose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWCA 215 at [48] ('*Ceeroose*')):

"[88] Obviously, it is not every mistake in understanding the facts, in applying the law or in reasoning to a conclusion that will amount to a constructive failure to exercise jurisdiction. But where, as here, the mistake is essentially definitional, and amounts to a basic misunderstanding of the case brought by an applicant, the resulting flaw is so serious as to undermine the lawfulness of the decision in question in a fundamental way."

- 65 Finally, and with respect to the contention that it was a breach of statutory obligations (and noting that there is no identification of the section(s) said to have been breached), the High Court observed in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 at [4] ('*LPDT*') (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ) that:

"A statute which contains an express or implied condition of a conferral of decision-making authority is not always to be interpreted as denying legal force and effect to every decision that might be made in breach of that condition. Only by construing the statute so as to understand the limits of the statutory conferral of decision-making authority is it possible to determine, first, whether an error has occurred (that is, whether there has been a breach of an express or implied condition of the statutory

conferral of decision-making authority) and, second, whether any such error is jurisdictional (that is, whether the error has resulted in the decision made lacking legal force).” (citations omitted)

66 It is not correct to say that the matter was not taken into account. The Dental Council’s consideration of the conduct proceeded on the basis that the dentist might have failed to conduct a comprehensive assessment, and specifically might have failed to diagnose T38 as suffering from decay. That consideration was adopted by the HCCC, which is a reasonable course noting that the issue is one of technical proficiency and the Council is best placed to assess that. As the review decision noted:

“During the assessment, the Dental Council of New South Wales thoroughly examined your concerns. This statutory body comprises practitioners, legal experts, and community representatives, most of whom are nominated by the NSW Minister for Health and appointed by the Governor of NSW. The Council possesses the authority to regulate the conduct and health of registered dental practitioners.”

67 Second, the matters raised by the plaintiff are essentially speculative (*Hastwell*). There was no material before the HCCC as to what the state of T38 was as at the date of consultation, whether the “discolouration” was visible, or what conclusions were available if it was present. The plaintiff’s own contentions refer to “the black mark - previously obscured” becoming clearly visible following T38’s extraction. While there is no doubt that the plaintiff raised the issue of discolouration, that was not an issue based on “established facts”.

68 Third, it was not a “substantial” argument. As the Court of Appeal observed in *Ceeroose* at [46], that formulation in *Dranichnikov* “was used to identify a failure on the part of the Tribunal to address the central claim it was required to determine”.

69 A slightly different way of putting it is that to the extent that the Commission failed to consider the discolouration (or more accurately, the possibility that discolouration was present which the dentist did not adequately consider), that was not material. This is because the determination proceeded on the basis that the dentist may well have failed to carry out a “comprehensive examination”. An error is only jurisdictional when “there is a realistic possibility that the decision that was made in fact could have been different if the error had not occurred” (*LPDT*).

HCCC’s oral submissions

70 Counsel for the HCCC noted the material that was provided to the Dental Council when the first decision (not the HCCC’s review decision) was made. Counsel for the HCCC then noted that the plaintiff had not identified which material was new and had not been provided to the Dental Council.

“... So, all of that material was before the Dental Council and Mr Adams hasn’t identified in the material which was submitted as part of the review, what was the new material about T38 that required the Dental Council to look at it. And, in my submission, there was nothing new that was material in relation to tooth 38 that required a review by a

peer expert. So the Dental Council at the time that they did the assessment had all of the relevant material, including the medical records, the photographs by the dentist, the photographs by Mr Adams and his description of what had happened.” (T37 [25]-[33])

- 71 Counsel for the HCCC also noted that in the Dental Council’s agreed outcomes from its 8 August 2024 consultation (CB 94 and Ex B), it rejects the dentist’s assertion that tooth T38’s condition at the time of extraction should not have changed dramatically in three months. It was for this reason that the Dental Council recommended that the dentist be given comments, a significant outcome for a newly practising dentist, made where some shortcoming had been identified.

“CHATTERJEE: The council accepts there that a diagnosis of a vertical fracture, so that’s what tooth 28 ...(not transcribable)... The fourth paragraph which starts, “There is concern however”, is the council rejecting Dr [Cai’s] assertion that tooth 38 didn’t look the way the photograph showed because what the council says is last sentence, “This is generally inaccurate as apart from cracks,” so that’s tooth 28, “the condition of a tooth should not vary dramatically over three months.” And that sentence starts with, “There is concern however that Doctor [Cai] does not recognise the possibility that his examination may not have been thorough.”

HER HONOUR: Yes.

CHATTERJEE: And that is what leads to the recommendation that he be given comments. And the council notes that Dr [Cai] was a very new graduate. And then the recommendation is that comments be given to him that he needs to take ownership of shortcomings and he must improve his clinical skills and he must ensure his clinical examinations are absolutely thorough. And your Honour will appreciate that particularly for a new practitioner having comments made to the practitioner by the regulator, is a matter of importance and it wouldn’t be made unless a shortcoming had been identified. In other words, Mr Adams’s case on a factual basis doesn’t succeed because there was a recognition that there may have been a misdiagnosis or a failure to diagnose on 2 November 2023 about tooth 38...” (T39 [43]-T40 [16])

- 72 Counsel for the HCCC submitted that the plaintiff’s complaint about the dentist was disciplinary in nature, and that the Dental Council, as the peer authority for dentists, was in the best position to determine how far below standard, a dentist’s conduct falls.

“CHATTERJEE: The Dental Council, your Honour, your Honour will be aware is the peer authority for dentists. They are the best position to assess how far below standard a dentist’s conduct falls, as between the commission and the council, that judgment is best placed with the Dental Council because this is a matter of technical skill, not propriety. Your Honour will appreciate that this is a disciplinary complaint.

HER HONOUR: Yes, I do.

CHATTERJEE: And even negligence is not necessarily a breach of the code of conduct or a disciplinary matter because when it comes to skill it has to be significantly below the standard before it becomes a disciplinary issue. So the judgment of the peer experts was that there was a possibility that there had not been a diagnosis and the council considered that in terms of the level of that deficiency, what was appropriate were comments from the commission. And in my submission, that’s certainly within the bounds of reasonableness for a decision as to how severe the conduct was. And your Honour will not disturb or would not consider it appropriate to assess that reasonableness in the context of a judicial review.” (T40 [47]-T41 [15])

- 73 Counsel for the HCCC then submitted that in the Commission’s review decision, it was clear that the Commission dealt with the issue of the dentist’s treatment of T38.

“CHATTERJEE: The review decision is a review of this decision, but it’s not the section 28 notice because he’d already received the section 28 notice here. And if your Honour looks at this, you will see the second paragraph “Severely decayed lower left wisdom tooth”, that’s at the fourth line. “...(not transcribable)... cognisant of tooth 38.”

HER HONOUR: Yes.

CHATTERJEE: And then if you look at “Outcome of assessment.”

HER HONOUR: Yes.

CHATTERJEE: That is obviously dealing with tooth 28 because that concerns the third ... (not transcribable). ... Then over the page, second bullet point there's a rejection of Dr [Cai's] assertion that tooth 38 didn't look like that. It says "This is generally inaccurate."

HER HONOUR: Yes.

CHATTERJEE: And then the determination that--

HER HONOUR: We've read.

CHATTERJEE: --comments will be given.

HER HONOUR: Yes. That's right.

CHATTERJEE: So, looked at in context, there's no doubt that the commission appreciated that there was an issue with tooth 38. All of the records were provided in the judgment of the peer Council. The gravity of that warranted comments but nothing further.

HER HONOUR: Yes. I understand.

CHATTERJEE: If your Honour looks at the review decision, your Honour had noted that the third bullet point refers to tooth 38.

HER HONOUR: Hang on, let me find - there it is. Yes.

CHATTERJEE: And what is addressed there is tooth 28.

HER HONOUR: Yes.

CHATTERJEE: Because it's dealing with fractures.

HER HONOUR: That's right.

CHATTERJEE: And now that your Honour has context, your Honour will understand that the fourth bullet points concerns tooth 38 because it's a rejection of Dr [Cai's] assertion that tooth 38 didn't look like that." (T41 [48]-T42 [47])

Resolution – judicial review grounds 1, 3 and 5

74 The plaintiff's judicial review grounds 1, 3 and 5 traverse the same ground. The core complaint is failure by the HCCC to take into account the "black discolouration" on T38 said to have been present at the date of consultation, which was not noted by the dentist of the plaintiff's complaint, and which is said to be "generally indicative of significant dental issues." Judicial ground 1 describes this as a denial of procedural fairness; judicial ground 3 describes it as an error to consider key evidence; and judicial ground 5 describes it as a breach of statutory obligations.

75 It is my view that the HCCC's review addressed the plaintiff's concerns in relation to T38. At . point 3 of its decision it stated:

"While Dr Cai did not identify any issues with teeth 28 and 38, the complexities of diagnosing vertical fractures were acknowledged by Council. It is understood that tooth 28 was later diagnosed with a vertical root fracture on 1 February 2024, and subsequently extracted by Dr Yurka."

76 While the plaintiff referred to T28, the central cause of his concern was T38. The HCCC review panel rejected the dentist's assertion that T38 "did not look like that", recognising that there was an issue with T38. The panel adopted the peer review, that of the Dental Council, which rejected the dentist's opinion as to the state of T38, but as the dentist was newly graduated, it considered the verity of the dentist's opinion as to the state and treatment of T38 warranted counselling but nothing further. In these

circumstances there was no denial of procedural fairness, as the review panel did consider the key evidence and did not breach its statutory obligations. Judicial grounds 3 and 5 fail.

Judicial review ground 4 – neglect of public safety concerns

Plaintiff's submissions

- 77 The HCCC failed to recognise the broader implications of the dentist's diagnostic oversight, particularly the risk to public health if similar failures occur with other patients.
- 78 The decision to only advise the dentist to be more thorough does not adequately address the potential harm to other patients, reflecting a failure to uphold healthcare standards.
- 79 This omission breaches the HCCC's statutory duty to protect public health and safety. The principle that healthcare regulators have a duty to protect public health and safety is reinforced by the reasoning in *R v Department of Health; Ex parte Source Informatics Ltd* [2000] 1 All ER 786, where the Court emphasised that the handling of confidential medical information must be conducted with proper regard to legal obligations. In the context of healthcare complaints, this principle extends to ensuring that investigative processes adequately address potential public health risks. The HCCC's failure to fully address the implications of the dentist's diagnostic oversight, particularly regarding the black tooth that was ultimately found to be significantly decayed, demonstrates a lack of thoroughness in assessing the potential risk to other patients. By merely advising the dentist to be more thorough, rather than addressing the underlying public safety concerns, the HCCC did not adequately fulfill its statutory duty to protect public health and safety.

HCCC's submissions

- 80 As identified in *Hastwell*, the evaluative judgment reposed in the HCCC to discontinue a complaint is a broad one. The determination to discontinue with comments was within the bounds of reasonableness. There is no basis on which to assume that the dentist would present a risk to the public health or that any such failures (if indeed they occurred) would happen again.
- 81 While it is not doubted that the plaintiff is genuinely aggrieved by the determination, "[e]ven emphatic disagreement with the ... reasoning is not sufficient" to make out illogicality or unreasonableness (*BQQ15 v Minister for Home Affairs* [2019] FCAFC 218 at [51(c)]).

Resolution

82 The dentist was a new graduate who had only been in practice for a short while. In my view that is a consideration the Dental Council and the HCCC were obliged to take into account. The dental council did not accept the dentist's account on examination and evaluation of T38 was correct. Some of the allegations made by the plaintiff were not made out. In my view, the decision of the HCCC to discontinue the action with comments being given to the dentist was reasonable. The HCCC concluded that it did not consider that the dentist would present a risk to public health. It is a matter for the Dental Council to evaluate what is reasonable in the circumstances. Judicial ground 4 fails.

Additional judicial review ground 7 – s 28(8) of the HCC Act

83 During the hearing, the plaintiff raised a new ground of judicial review being that the decision of the Dental Council did not contain adequate reasons as required by s 28(8) (b) of the HCC Act.

84 In *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43;(2013) 252 CLR 480 ('*Wingfoot*'), the High Court considered the obligation on a Medical Panel. At [55] the High Court stated:

"[55] The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law."

Plaintiff's submissions

85 The plaintiff submitted that while the HCCC does refer to some photos, it is unclear which photos and which teeth it is referring to in its decision. Rather, the plaintiff asserts that the HCCC confused itself with broad references to photos and conditions of teeth and in so doing did not provide reasons for the decision in accordance with s 28(8)(b) of the HCC Act.

"PLAINTIFF: I mean, look - I mean, look, point number 4, they discuss and they said that they considered photos. But they don't say what photos--

HER HONOUR: They say "Photo."

PLAINTIFF: --that they are referring to. But tooth 38, the - the condition of the tooth can be proved what that condition of the tooth was in the past previous three months because Dr [Cai] cleaned the black off, so he already saw it. So, obviously in point number 4 they can't be talking about tooth 38. That's my point. Do you understand what I'm saying, ma'am?

HER HONOUR: I understand what you're saying. I understand what you're telling me. But I'm not sure that I see the point.

PLAINTIFF: Okay. My point is that [dot] point number 4, they have convoluted and confused the issues. Therefore, my point on section 28--

HER HONOUR: Yes.

PLAINTIFF: --point 8B. It still exists. They did not give a reason for the decision.

HER HONOUR: Well, in respect of tooth 38?

PLAINTIFF: Yeah.” (T26 [19]-[43])

- 86 Ultimately, the plaintiff submitted that . point 4 specifically of the HCCC’s review decision dated 4 October 2024, which stated that the photos of the extracted tooth submitted by the plaintiff “did not accurately reflect its condition over the previous three months” is a reference to the upper left tooth that was removed and not tooth T38 because the black was cleaned off by the dentist. Further, the plaintiff submitted that given the public interest in this matter, the dentist missed the condition of some of the plaintiff’s teeth and those “conditions could have significant consequences”, the review decision of the HCCC should be quashed and remitted back to be determined correctly, with proper reasons.

“PLAINTIFF: --39 of the review of the decision, point 4 - point 4 is actually - it is discussing the tooth that was removed on - on the - on the upper left. It actually is not in contact - contacts with point 3, with tooth 38, because tooth 38, the condition cannot be proved before I saw Dr [Cai] because he cleaned off the black - so, before I saw Dr Yurka, for the fact is that Dr [Cai] cleaned off ...(not transcribable)... the black. So, clearly point number 4 is not actual talking about tooth 38, it is talking - it is talking about the upper left wisdom tooth. So, I submit to the Court that the ...(not transcribable)... decision should be quashed and remitted back to the Health Care Complaints Commission--

HER HONOUR: Yes.

PLAINTIFF: --under s 28(8)(b). There’s clearly - there is clearly a stake of public interest here. There were three ...(not transcribable)... teeth the dentist missed, and wisdom teeth and infection can have very serious and even life-threatening consequences. I would hope that the Court remits it back under s 28, and this particular time that they can also get communication back from the - the Dental Council and the issue can be resolved with tooth 38 and this time the Health Care Complaints Commission can set out their outcome letter in - in not a convoluted and confusing—” (T28 [18]-[38])

HCCC’s submissions

- 87 Counsel for the HCCC noted that the plaintiff’s submissions in relation to s 28(8) of the HCC Act that the plaintiff spent most of his time dealing with, only appeared for the first time in the plaintiff’s reply submissions. As counsel explained, the plaintiff’s assertions that s 28(8) was breached because the HCCC did not provide adequate reasons in its review decision, has not been addressed in the HCCC’s written submissions because inadequate reasons does not equate to jurisdictional error, and whether construction of the statute means that the reasons were a precondition of the exercise of power.

“CHATTERJEE: Yes. I should note that s 28 appeared for the first time only in reply submissions.

HER HONOUR: Yes, we’ve actually managed to deal with it though. Well, I have, I’m sure you’re going to deal with it, but yes.

CHATTERJEE: Well, to some extent. I can certainly deal with s 28 in so far as it deals with his grounds of appeal which were breach of procedural fairness, et cetera, et cetera, et cetera. To the extent that Mr Adams is however making some sort of inadequate reasons point, that’s nowhere in my written submissions because it wasn’t raised and the issue’s actually quite complex. Because we’re not in error of law territory, we’re in jurisdictional error and inadequate reasons does not equate to jurisdictional error. It would depend on a construction of the statute whether the reasons were a precondition to the Appeal allowed with costs.

Set aside the order of the New South Wales Court of Appeal and, in lieu thereof, order that:

- (i) the appeal to that Court be allowed with costs;

(ii) the orders made by Clarke J. on 13 November 1986 be set aside; (iii) the action be stayed on condition that the appellant, in any

proceedings which the respondents bring in Missouri concerning the subject-matter of these proceedings, undertakes not to plead any defence based upon any statute or other law relating to the limitation of actions, provided the respondents commence their proceedings in Missouri within three months of this order; and

(iv) the respondents pay the appellant's costs of the proceedings before Clarke J.

exercise of power, which in turn will ...(not transcribable)... so it's actually, it's a lot more complicated than just ...(fault in recording equipment)..” (T30 [23]-[39])

Consideration

88 I have already addressed this issue in the earlier grounds of judicial review. In my view, the HCCC review decision have given adequate reasons. It squarely addressed the plaintiff's complaints as to the dentist's consultation and advice to him and adopted what the Dental Council, being the peer review panel, decided, in circumstances where the newly graduated dentist accepted these shortcomings, that the dentist needed to be counselled. The HCCC review panel in its statement of reasons explained its actual path of reasoning in sufficient detail to enable this Court to see whether the opinion does or does not involve any error of law. This decision accorded with *Wingfoot*. This ground of judicial review is dismissed.

The result

89 The plaintiff's application for judicial review fails and is dismissed.

Costs

90 Costs are discretionary. Costs normally follow the event.

91 At the conclusion of the hearing, the plaintiff submitted that even if he lost, he should not have to pay costs because it was brought as a matter of public interest.

“PLAINTIFF: Okay, I would - would your Honour entertain if I put forward an order that - that even if I lose that because it is a matter of public interest, that I - that I would not have to pay costs.” (T53 [39]-[41])

92 Counsel for the HCCC submitted that it was not a matter of public interest (T53 [45]).

93 It is my view that the plaintiff's complaints to the HCCC in relation to his tooth, T38, and the manner in which it was dealt with by the HCCC on review do not amount to a matter of public interest. Hence, there is no reason to depart from the normal rule. The plaintiff pay the defendant's costs.

Orders

94 The Court orders that:

- (1) The plaintiff's application for judicial review is dismissed.
- (2) The plaintiff's summons filed 23 November 2023 is dismissed.
- (3) The plaintiff is to pay the defendant's costs on an ordinary basis.

Amendments

17 October 2025 - Minor change

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 17 October 2025